No. 805 284

PETITION FOR WRIT OF CERTIORARI IN BANKRUPTCY

IN THE

SUPREME COURT OF UNITED STATES

OCTOBER TERM, A. D. 1923.

HENRY LEWIS,
Petitioner,

vs.

DAVID ROBERTS, JR.,
As Trustee in Bankruptcy of the Montevallo Mining Company, a Corporation, Bankrupt,
Respondent.

BIRMINGHAM PRINTING CO.

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HENRY LEWIS,

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As Trustee in Bankruptcy of the Montevallo Mining Company, a Corporation, Bankrupt,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, requiring it to certify to the Supreme Court ofthe United

States, for its revision and determination, the petition for review in bankruptcy taken by the said Henry Lewis against David Roberts, Jr., as Trustee in Bankruptcy of the Montevallo Mining Company, a corporation, Bankrupt, in Bankruptcy, lately depending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:..

The petition of Henry Lewis respectfully represents as follows:

FIRST:

This cause presents a diversity of decision in the Circuit Courts of Appeals on a clear-cut question in bankruptcy. The question is this:

Is a judgment based on simple negligence, rendered before bankruptcy, a provable claim in bankruptcy?

Two Circuit Courts of Appeal of the United States have held such a claim to be a provable debt against the estate of the bankrupt. See *Moore vs. Douglas*, 230 Fed. Rep. 394, from the Ninth Circuit, and in re *New York Tunnel Company*, 159 Fed. Rep. 688, from the Second Circuit. In the cause which petitioner now presents to this court, the Circuit Court of Appeals for the Fifth Circuit, by a divided court on November 20th, 1923, held that such a liquidated claim is not provable in bankruptcy.

The removal of this diversity of decision is impor-

tant in the future administration of bankrupt estates. Such claims have arisen with great frequency in the past and will no doubt arise with still greater frequency in the future. The increasing density of population, the expansion of mechanical means of production, and the development of automotive transportation will surely increase the number of personal injuries due to negligence and thereby present their derivative judgments in greater number before the courts of bankruptcy. A final decision by the Supreme Court is therefore very necessary for the future guidance of referees in bankruptcy.

SECOND:

The facts in this cause are clear and without dispute. Henry Lewis, your petitioner, was a convict in the penitentiary of the State of Alabama. The State of Alabama leased him, along with other convicts, to the Montevallo Mining Company. The mining company put him to work underground in its coal mines. While performing his work Henry Lewis received grevious bodily injuries because of the negligence of the mining company. He brought suit charging simple negligence only and recovered a judgment for Four Thousand Dollars ($4,000.00) in the District Court of the United States. About two months later the mining company filed its voluntary petition in bankruptcy. Henry Lewis filed his claim based on that simple negligence judgment.

The Referee, on motion of the trustee in bankruptcy of the mining company, expunged and disallowed Henry

Lewis' claim. On petition for review the district judge confirmed the order of the referee expunging and disallowing this liquidated claim. On appeal, the Circuit Court of Appeals for the Fifth Circuit could not agree. Two of the judges affirmed the judgment of the district judge. The presiding judge, Honorable R. W. Walker, wrote a dissenting opinion following all the previous decisions which held such a liquidated tort claim provable in bankruptcy. (Record____)

THIRD:

Petitioner believes that previous decisions are sound and that his claim is expressly made provable by subdivision 1 of Section 63A of the Bankruptcy Act.

Wherefore your petitioner contends that by reason of the decision in the case at bar, and the others herein cited, there is a diversity of opinion, and not a uniform administration of the Bankruptcy Act (as necessary as uniformity in the act itself, required by Section 8, Subsection 4, Article 1, of the Constitution of the United States) as to this important question, to-wit: If a claim for damages due to simple negligence is liquidated in a judgment before bankruptcy is that judgment a debt provable in bankruptcy?

Your petitioner appends hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court

of Appeals for the Fifth Circuit, commanding said court to certify and send to this court the agreement for the diminution of the record and the record as thus diminished, in the case therein entitled, "Henry Lewis, Appellant, vs. David Roberts, Jr., as Trustee in Bankruptcy of the Montevallo Mining Company, a Corporation, Bankrupt, Appellee, No._____," to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals may be reversed and Henry Lewis' liquidated claim be held a claim provable in bankruptcy against the estate of the Montevallo Mining Company.

And your petitioner will ever pray.

Henry Lewis

By Crampton Harris

His Attorney.

Counsel for Petitioner.

STATE OF ALABAMA
JEFFERSON COUNTY

Crampton Harris, being duly sworn, says that he is one of the counsel for Henry Lewis, the petitioner

named; and that he has read the foregoing petition, and the facts therein stated are true, as he believes.

Crampton Harris

CRAMPTON HARRIS.

Subscribed and sworn to before me on this the 1st day of February A. D. 1924. My commission expires 23rd June, 1924.

NANNIE RAY METCALFE,

Notary Public in and for Jefferson County, State of Alabama.

BRIEF AND ARGUMENT OF

CLAUDE D. RITTER,

Attorney for Henry Lewis in Support of His Petition For a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

STATEMENT OF THE CASE

This case presents to the court only one question, to-wit: Is a judgment based on simple negligence a provable claim in bankruptcy?

The question arises from undisputed facts. Henry Lewis, a convict, sued the Montevallo Mining Company for damages on account of personal injuries caused by the negligence of the company. He received his injuries while at work in the company's coal mine. The mining company was working Henry Lewis and other convicts in its mines by virtue of a lease of the convicts from the State of Alabama.

On the trial in the United States District Court, Henry Lewis recovered a verdict and judgment in the sum of Four Thousand Dollars ($4,000.00) under a simple negligence complaint. No appeal was taken by the defendant. About two months later, however, the mining company filed its voluntary petition in bankruptcy and was adjudicated a bankrupt.

Henry Lewis then made due proof of claim based on his judgment. The referee, on motion of the trustee,

respondent herein, disallowed and expunged the claim of petitioner. On a petition for review the district judge confirmed the order of the referee. Henry Lewis then appealed t othe United States Circuit Court of Appeals for the Fifth Circuit. That court, on November 20, 1923, affirmed the judgment of the District Court and held directly contrary to previous holdings of other Circuit Courts of Appeals on the identical question. In order to review that holding this application for a Writ of Certiorari is now made.

SPECIFICATION OF ERRORS

There being but one question and but one ruling in the case from the beginning, petitioner makes but one specification of error. The United States Circuit Court of Appeals erred in holding that the simple negligence claim of Henry Lewis liquidated by judgment before bankruptcy was not provable in bankruptcy. Such liquidated claims are provable.

BRIEF OF THE ARGUMENT

A fixed liability, evidenced by a judgment based on simple negligence, absolutely owing at the filing of the petition in bankruptcy is a debt provable in bankruptcy against the estate of the bankrupt.

Section 63A (*Subdivision* 1) *of the Bankruptcy Act.*
Moore vs. Douglas, 230 Fed. Rep. 399.
In re New York Tunnel Company, 159 Fed. Rep. 688.
Ex parte Harrison, 272 Fed. Rep. 543.

In re Putman, et al., 193 Fed. Rep. 464.
In re Cunningham, 253 Fed. Rep. 563.

ARGUMENT

We may express the law of Section 63A of the Bankruptcy Act in the form of an equation. Provable Debts= "(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon, which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition on action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments."

The discriminant of Subsection 1 is found in these words: "A fixed liability, as evidenced by a judgment absolutely owing at the time of the filing of the petition."

The claim of petitioner meets every requirement of provability. The amount was fixed at Four Thousand Dollars ($4,000.00) by the verdict of the jury. It was evidenced by the judgment entered thereon in the District Court. No appeal was ever taken, hence the claim was absolutely owing.

The judges who held otherwise attached too much significance to the word "debts" in 63A. The five subdivisions of 63A define, for provability, what are debts. The effect of the enumerated subdivisions is not to be confined within the limited area circumscribed by the strict technical meaning of the word "debts." The key is not "debts" but rather the words "a fixed liability." Fixed liabilities evidenced by judgments are defined by the section as provable debts.

Their holding would make unimportant the distinction between liquidated and unliquidated demands. It would prevent proof of a judgment unless the unliquidated claim on which the judgment was rendered was itself provable. Yet the Congress clearly had in mind the difference between judgments rendered on provable debts and those based on non-provable debts. This becomes apparent on reading Subdivision 5 of 63A which reads:

> "and (5) *founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge*, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments."

The difference thus indicated between the two classes of judgments is clear. A judgment based on a non-provable claim must be rendered before bankruptcy in order to be provable. But a judgment based on a provable claim may be rendered after bankruptcy and still be provable in bankruptcy.

If this were not so, it would have been unnecessary for Congress to make the specific distinction found in Subdivision 5. If judgments on non-provable debts were never provable under any circumstances, then the classification found in Subdivision 5 of 63A could be but senseless surplusage. We must conclude that Congress inserted the word with a purpose.

There is nothing in the words "a fixed liability as evidenced by a judgment" to indicate any intention to differentiate between such liabilities founded on contract and those arising from tort.

All the previous decisions we have found are to this effect. In *Moore vs. Douglas*, 230 Fed. Rep. 399, the judges for Ninth Circuit, Gilbert, Ross and Hunt, say:

> "We know of no reason why a judgment rendered before petition in bankruptcy is filed in an action upon a liability arising out of a tort should be regarded as less a debt owing under Section 63A than if it were one arising upon other obligations or liabilities."

The Circuit Court of Appeals for the Second Circuit, composed of Judges Lacombe, Ward and Noyes,

say in the case of *In re New York Tunnel Company*, 159 Fed. Rep. 688, at 690:

> "Judgments rendered before bankruptcy whether based upon liability for tort or contract are expressly provable under Section 63A. The exception in Section 17 was to prevent judgments for certain torts being discharged."

Judge Morton of Massachusetts had the same question before him in *Ex parte Harrison*, reported in 272 Fed. Rep. 543. At page 544 we find him saying:

> "There has been some difference of judicial opinion as to whether a judgment upon a claim for negligent injury constitutes a "debt," which can be proved and is discharged by bankruptcy proceedings; but the weight of authority now appears to be that the judgment can be proved and is discharged. In re Putnam (D. C.) 193 Fed. 464; Ex parte Margiasso (D. C.) 38 Am. Bankr. Rep. 524, 242 Fed. 990; In re Madigan (D. C.) 41 Am. Bankr. Rep. 771, 254 Fed. 221. *In Schall vs. Camors*, 251 U. S. 239, 40 Sup. Ct. 135, 64 L. Ed. 247, *there was no judgment.*"

Judge Farrington considered the question in the case of *In re Putnam*, 193 Fed. Rep. 464. At page 468 he says:

> "There is no qualification in this language indicating that Congress intended to distinguish between judgments ex contractu and judgments ex delicto.

"Collier in the last edition of his work on Bankruptcy, page 700, says that judgments grounded in tort are almost without exception provable.

"In Remington on Bankruptcy, § 680, it is said that:

"'Judgments for personal injury and other similar torts not capable of being presented in form ex contractu are provable, although the unliquidated claims for torts themselves would not be provable.' In re Lorde (D. C.) 144 Fed. 320; 1 Remington on Bank, §§ 635, 680; Collier on Bank, p. 706."

The cases of *In re Lockwood*, 240 Fed. Rep. 158, and *In re Cunningham*, 253 Fed. Rep. 663, are to the same effect. Every text writer we have been able to consult an devery state court decision we have seen announces the same rule.

The present case stands out a solitary exception. It introduces a diversity of opinion that should be promptly removed.

We believe provability is the only question in the case. Jurisdiction to grant the writ would seem to exist without question. Contrariety of opinion by different Circuit Courts of Appeals on such an important section of the Bankruptcy Act seems sufficient to invoke the jurisdiction of this court. Uniformity of construction appears fully as necessary as uniformity in the law itself. We therefore do not cite any cases on what we regard as unquestionable law.

We respectfully submit that the petition of this con-

viet for a Writ of Certiorari should be granted, the judgment of the United States Circuit Court of Appeals for the Fifth Circuit reversed, the law of bankruptcy on this important point clearly established and the claim of Henry Lewis allowed.

Claude D. Ritter

Respectfully submitted,

CLAUDE D. RITTER,
Attorney for Petitioner, Henry Lewis.

NOTICE OF MOTION OF PETITION OF CERTIORARI FROM SUPREME COURT TO CIRCUIT COURT OF APPEALS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of the Petition of Henry Lewis for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Fifth Circuit to Bring Before the Supreme Court the Case of Henry Lewis, *Petitioner*.

vs.

David Roberts, Jr., as Trustee in Bankruptcy of the Montevallo Mining Company, a Corporation, Bankrupt, *Respondent*.

To Messrs. Nesbitt & Sadler, Attorneys of Record for David Roberts, Jr., as Trustee in Bankruptcy of the Montevallo Mining Company, a Corporation, Bankrupt:

Sirs—Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of Henry Lewis, sworn to on the 1st day of February, 1924, I shall move the motion and petition

hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, the 18th day of February, 1924, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dater Birmingham, Alabama, February 1st, 1924.

Yours truly,

C. D. RITTER,

Attorney and Counsel for Petitioner, Henry Lewis, First National Bank Bldg., Birmingham, Ala.

MOTION

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1923.

Henry, Lewis, *Petitioner*,
vs.
David Roberts, Jr., as Trustee in Bankruptcy of the Montevallo Mining Company, a Corporation, Bankrupt, *Respondent*.

Now comes Henry Lewis, by Claud D. Ritter, his attorney, and moves this Honorable Court that it should, by writ of certiorari or other process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, require said court to certify to this court for its review and determination a certain cause in said court lately pending wherein Henry Lewis was Appellant and David Roberts, Jr., as Trustee in Bankruptcy of the Montevallo Mining Company, a Corporation, Bankrupt, was Appellee, and to that end now tenders herewith his petition and a certified copy of the entire record as diminished by agreement in said

cause in said Circuit Court of Appeals of the United States for the Fifth Circuit.

Claude D. Ritter

CLAUDE D. RITTER,
Attorney for Henry Lewis.

Service of the foregoing motion is hereby admitted this the 1st day of February, 1924.

NESBIT & SADLER, per J. R. B.,
Attorneys for Respondent.

UNITED STATES OF AMERICA

JUDICIAL DEPARTMENT

IN THE SUPREME COURT

No. 284

HENRY LEWIS,
Petitioner,
vs.
DAVID ROBERTS, JR., TRUSTEE OF MONTE-VALLO MINING COMPANY, BANKRUPT,
Respondent.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

BRIEF OF WILLIAM H. SADLER, JR.,
For the Respondent.

Birmingham Publishing Co.—50—2-2-25

UNITED STATES OF AMERICA

JUDICIAL DEPARTMENT

IN THE SUPREME COURT

No.----------

HENRY LEWIS,
Petitioner,
vs.
DAVID ROBERTS, JR., TRUSTEE OF MONTE-VALLO MINING COMPANY, BANKRUPT,
Respondent.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

STATEMENT OF THE CASE

The only question presented in this proceeding is whether or not a judgment recovered prior to bankruptcy, upon a tort claim not resulting in the enrichment of the tort-feasor, is provable under Section 63a of the Bankruptcy Act.

The question arises upon the following state of facts: Petitioner, Henry Lewis, a convict of the State of Alabama, received personal injuries while in the service of the Montevallo Mining Company under a lease from the State. The convict sued for damages and recovered a judgment against the Company upon a complaint or declaration charging that his injuries proximately resulted from negligence.

Shortly thereafter the company was adjudicated a bankrupt. Thereupon Henry Lewis filed his judgment as a claim against the bankrupt's estate. The Trustee in Bankruptcy made a motion to reconsider and reject the claim. The Referee granted the motion and made an order rejecting the claim. Upon review by the District Court the Referee's order was confirmed and the decision of the District Court was, upon appeal, affirmed by the Circuit Court of Appeals. A writ of certiorari brings the case to this court.

BRIEF OF THE LAW

I.

All prior Bankruptcy Acts, both of the United States and England, have dealt primarily and particularly with the concerns of traders.

Schall v. Camors, 251 U. S. 239; 64 Law Ed. 247.

II.

A claim to be provable under section 63a of the Bankruptcy Act must be contractual in its nature.

Schall v. Camors, supra.
Wetmore v. Markoe, 196 U. S. 68; 49 L. Ed. 390.
Bankruptcy Act, Section 57j.

III.

Section 63b provides the procedure for liquidating claims provable under clause *a* if not already liquidated.

Schall v. Camors, supra.
Dunbar v. Dunbar, 190 U. S. 340; 47 L. Ed. 1084.
Grant Shoe Co. v. Laird Co., 212 U. S. 445; 53 L. Ed. 591-594.
Central Trust Co. v. Chicago Auditorium Assn., 240 U. S. 581; 60 L. Ed. 811.

IV.

An unliquidated claim based upon a tort which does not unjustly enrich the tort-feasor, is not provable under Section 63b.

Schall v. Camors, supra.

V.

A judgment partakes of the same nature as the claim upon which it is founded.

Wisconsin v. Pelican Insurance Co., 127 U. S. 265; 32 L. Ed. 239.
Wetmore v. Markoe, supra.
Boynton v. Hall, 121 U. S. 457; 30 L. Ed. 985.
3 R. C. L., p. 238.

ARGUMENT

It must be conceded that had the claim of Henry Lewis not been reduced to judgment prior to bankruptcy it could not have been liquidated under Section 63b, because not founded upon a contract. Such is the direct holding in Schall vs. Camors, supra.

In that case this court also decided, in line with prior cases on the point, that clause *b* provides the procedure for liquidating claims provable under clause *a* if not al-

ready liquidated. To the same effect is Dunbar v. Dunbar, supra, where the court uses this language: "This ¶ b, however, adds nothing to the class of debts which might be proved under ¶ a of the same section. Its purpose is to permit an unliquidated claim, coming within the provision of section 63a, to be liquidated as the court should direct." Section 63b contains no limitation upon the character of unliquidated claims which that section permits the liquidation of, yet the holding of this court is that only claims founded upon contracts come within its provisions. The field of operation of section 63b is limited to contractual claims not indeed because its language is not broad enough to include tort claims, because it is broad enough to include them. But that limitation results from the view that the act has to do with contractual matters, concerns of traders, only.

In Wetmore v. Markoe, supra, the question was whether or not a judgment for alimony was dischargeable, and the court held that such a judgment was not provable, therefore not dischargeable. (The case was decided before the amendment of Section 17 expressly excepting such claims from the effect of a discharge.) In the opinion it is said: "* * * but this fact does not * * * determine whether a claim for alimony is in its nature *contractual* so as to make it a debt." (Italics ours.)

An important observation upon section 63a is made in that case in the following language: "While this section enumerates under separate paragraphs the kind and character of claims to be proved and allowed in bankruptcy, the classification is only a means of describing 'debts' of the bankrupt which may be proved and allowed against his estate."

Having made that observation the court in Wetmore v. Markoe states the question thus: "The precise ques-

tion, therefore, is, Is such a judgment as the one here under consideration a *debt* within the meaning of the Act?" (Our italics.)

To the conclusion that such a judgment was not a debt within the meaning of the act, the court quoted with approval the following excerpts from Audubon v. Shufeldt, 181 U. S. 577; 45 L. Ed. 1910: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on a contract express or implied but on the natural and legal duty of the husband to support the wife"; and: "The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty."

It seems clear, therefore, from the decisions of this court that to be provable under 63a the claim must be based upon a contractual obligation. This construction is fortified by the fact that section 57j relating to proof of claims requires a statement of "the consideration therefor"—an expression peculiarly appropriate to contracts.

But petitioner says that because his claim has been reduced to judgment it is ipso facto provable without regard to the nature of the claim.

It is perceived, however, that the reduction of the claim to judgment did not change its essential nature. This court has settled the proposition that an obligation reduced to judgment is the same obligation as before. Such is the holding in Wisconsin v. Pelican Ins. Co., supra, in which it is said: "The essential nature and real foundation of a cause of action are not changed by recovering a judgment upon it; and the technical rules which regard the original claim as merged in the judgment and the judgment as implying a promise by the defendant to pay it, do not preclude a court to which a

judgment is presented for affirmative action (while it can not go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

To the same effect is Boynton v. Hall, supra, a bankruptcy case, in which the court says, after stating appellant's contention: "But this court, to which this precise question is now presented for the first time, is clearly of the opinion that the debt on which this judgment was rendered is the same debt that it was before; that notwithstanding the change in its form from that of a simple contract debt or unliquidated claim, or whatever its character may have been, it still remains the same debt on which the action was brought in the state court."

Indeed, the real question in Wetmore v. Markoe was the effect that reducing a claim to judgment had upon the provability. It had already been determined (in Audubon v. Shufeldt, supra) that a claim for alimony which had not been placed in the form of a final judgment was not provable, but it remained to be determined what effect a final judgment would have upon the provability of the claim. Addressing itself directly to that inquiry, the court said: "It is true that, in the cases referred to, the decrees were rendered in courts having continuing power over them with power to alter or amend them upon application; but this fact does not change the essential character of the liability, nor determine whether a claim for alimony is, in its nature, contractual so as to make it a debt. The court having power to look behind the judgment, to determine the nature and extent of the liability, the obligation enforced is still of the same character notwithstanding the judgment."

The attempt is made to lessen the force of Wetmore v. Markoe as an authority by saying that the pronouncement of the obligation to pay which this court was considering was a decree in equity and not a judgment at law. But the attempt must be futile because the court itself did not intimate any such basis for its decision. On the contrary, the court commented upon the finality of the pronouncement and spoke of the pronouncement as a "judgment." Note this language of the court: "It is insisted, however, that, there being in this case no reservation of the right to change or modify the decree, it has become an absolute *judgment*, etc." And this: "It may be admitted * * * that * * * the *judgment* for alimony becomes absolute." And then the statement of the question for decision: "The precise question, therefore, is, Is such a *judgment* as the one here under consideration a debt within the meaning of the act? The mere fact that a *judgment* has been rendered does not prevent the court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to *judgment*." (Italics ours.)

It seems therefore that Wetmore vs. Markoe can not be distinguished on that ground.

It is further attempted to distinguish that case by saying that it was based upon the consideration that the judgment to pay alimony, because of sentimental reasons, can not be thought to have been within the contemplation of the law makers in the passage of the Bankruptcy Act; that because of the moral obligation to support the wife, Congress did not intend that the judgment evidencing same, though fixed and final and absolutely owing, should be dischargable, hence not provable. The suggestion, even if true, profits appellant nothing because, as we understand their insistence, it is that this

claim, being in judgment, is, for that reason, provable; that all judgments are provable regardless of the nature of the claim upon which founded. Once they admit that it is proper to look beneath *any* judgment their argument falls. It is immaterial for the purposes of this discussion that the court in Wetmore vs. Markoe, when it looked beneath the judgment, may have found it resting upon essentially a moral obligation. The important thing is that even tho the court had determined the existence of a final judgment it did not conclude that for that reason, ipso facto, it was provable, but proceeded to inquire whether the judgment was the *kind* of a judgment that was provable.

But it can not be fairly said that the court rested its decision upon the idea that the claim for alimony rested fundamentally upon a moral obligation. Reference to its nature as such was made primarily to show that it did not rest upon a *contractual* obligation. The quotations from the case appearing supra show how the court was distinguishing that case from a case based upon a *contract*. We repeat one of the quotations as follows: "* * * but this fact does not * * * determine whether a claim for alimony is in its nature *contractual so as to make it a debt.*" (Italics ours.)

It is also suggested that the question presented in Wetmore v. Markoe was whether the judgment was dischargeable and not whether it was provable. But this suggestion comes to nothing when it is noted that at the time that case was decided, claims for alimony were not expressly excepted from the effect of Section 17. As the law then was, all *provable* debts were dischargeable (with certain exceptions not including claims for alimony), and the only way to determine whether or not

the judgment was dischargeable was to determine first whether or not it was provable.

It is argued that a judgment for a tort should be provable and dischargeable because the purpose of the act was to relieve honest debtors with the result of enabling them to start anew with a clean slate, except as to specified liabilities the release from which is denied by the act. The argument is a poor one because it is conceded that the bankrupt may, notwithstanding his bankruptcy, be harassed with any and all unliquidated tort claims, and it may be highly important to the bankrupt to be relieved of those obligations and those excepted from section 17.

But the question here is the *provability* of a claim and the persons to be considered in that connection are the creditors and not the bankrupt. Among whom ought the assets of the bankrupt be divided? Among those whose goods and labor have created what estate he has? Or shall their goods and labor be taken to pay the claim of one who contributed nothing to that estate? Certainly there is more reason to exclude a tort judgment creditor from participation in those assets than there is to exclude a claim for alimony.

And why should the existence of a judgment upon the tort make the difference between provability or not? Could not Congress have provided for the liquidation of a tort claim in the bankruptcy court as well as a claim founded upon a contract? If section 63a (1) be construed as embracing *all* judgments, by the same token paragraph *b* should be construed as embracing *all* unliquidated claims. The rule the opposition is contending for would enable the tort claimant who had been injured far enough in advance of bankruptcy to procure a judgment, to prove his claim and secure payment and deny

that right to one injured so soon before bankruptcy that he could not obtain a judgment. True, a judgment on a contract rendered more than four months prior to bankruptcy may result in a lien which bankruptcy will not discharge, whereas the lien of the later judgment will be discharged. But a creditor may choose his own time for dealing with the bankrupt and extend credit or not as and when he pleases. If he extends credit to an insolvent person upon the eve of bankruptcy he has himself alone to blame, and must stand upon the same plane as others who have done likewise or been slothful. But the injured person does not choose his time to become the victim of the bankrupt's negligence. There is no reason to exclude from participation in the assets the person recently injured and grant full right of participation to the one whose tort claim has become evidenced by a judgment.

Section 63a (1) does not deal alone with judgments. The language is: "as evidenced by a judgment or an instrument in writing." An obligation evidenced by an instrument in writing is placed upon the same plane as one evidenced by a judgment, entitled to the same weight and consideration. But alimony, though the parties have agreed upon the amount and committed the matter to writing, would neither be provable nor dischargeable. It must be then, that judgments must be similarly inspected to determine their real nature. The use of those two expressions, and in the disjunctive, seem to show Congress had in mind at the time only the certainty of the matter rather than lifting the ban on torts and considered the claim sufficient in that respect if evidenced by a judgment or by an instrument in writing; that the requirement of certainty was satisfied as well by an instrument in writing as by a judgment. But assuredly

Congress did not mean that any obligation of whatsoever nature is provable if only it be evidenced by an instrument in writing. If being evidenced by an instrument in writing will not admit to proof a claim founded upon tort neither will its being evidenced by a judgment admit it to proof.

This court's attention is respectfully directed also to enumeration (3) of Section 63a allowing proof of a debt which is founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition on action to recover a provable debt. The necessary inference is that costs similarly incurred on a suit by the creditor to recover on a tort claim are not provable. And yet, according to appellant's theory of the matter, costs in such a tort action are provable if, in addition, a judgment for damages has been rendered. There seems no good reason why tort costs, without an additional sum for damages, should not be provable but provable if enhanced by judgment for damages, especially so when the fact that there has been no judgment at the time of bankruptcy may be due to no fault or want of right on the part of claimant.

Another consideration: In subdivision (5) of the section to be construed provision is made for proceeding to judgment in a pending action founded upon a *provable* debt, but, it will be noted, no such provision is made in respect to a pending action upon a tort. Why is it, we wonder, that Congress should have thus discriminated between the two classes of claims, when *neither* had been reduced to judgment and made no such discrimination between them when *both* had been reduced to judgment? The only plausable explanation would seem to be that the discrimination here noted is made all through the Act.

It has been suggested that because of some imagined or real inconsistency between Section 17 and Section 63 the scope of the latter section is enlarged. The suggestion is now out of date, having been considered in Schall v. Camors and put aside. It may not be out of place to remark, however, that Section 17 is a limitation and not a grant and the former is not to be considered as enlarging the latter.

There are indeed some decisions by some of the lower courts which support appellant's contention. Those cases, however, proceed upon the untenable theory that the courts are without right to look beneath the judgment—a theory unsound in reason and inconsistent with the decisions of this Honorable Court.

Respectfully submitted,

William H. Sadler, Jr.

Attorney for the Respondent.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court which confirmed an order of a referee in bankruptcy disallowing the petitioner's claim.

Mr. H. L. Black for petitioner.

No appearance for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The petitioner, Lewis, recovered a judgment against the Montevallo Mining Company for personal injuries caused by its negligence. The Company was thereafter adjudicated a bankrupt in the Northern District of Alabama. Lewis filed in the bankruptcy proceeding a proof of claim upon the judgment. The District Court confirmed an order of the referee disallowing this claim, upon the ground that a judgment founded upon a tort was not provable in bankruptcy. This decree was affirmed by the Circuit Court of Appeals. 294 Fed. 171. The writ of certiorari was then granted. 264 U. S. 578.

This decision is in conflict with an unbroken line of decisions in other Circuit Courts of Appeals and in the District Courts. *Re New York Tunnel Co.* (C. C. A.), 159 Fed. 688, 690; *Moore* v. *Douglas* (C. C. A.), 230 Fed. 399, 401; *Re Putnam* (D. C.), 193 Fed. 464, 468. And see *Re Lorde* (D. C.), 144 Fed. 320; *Ex parte Margiasso* (D. C.), 242 Fed. 990; *In re Madigan* (D. C.), 254 Fed. 221.

We think these prior decisions were correct.

Section 63a of the Bankruptcy Act,[1] entitled "Debts which may be Proved," provides that: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judg-

[1] Act of July 1, 1898, c. 541, 30 Stat. 544.

ment . . . absolutely owing at the time of the filing of the petition. . . ." Section 1, (11) declares that the word "debt" as used in the Act shall, unless inconsistent with the context, be construed to include "any debt, demand, or claim provable in bankruptcy."

It is clear that a judgment for tort is provable under the express provisions of § 63a(1). The language is broad and unqualified. It includes "a fixed liability" evidenced by a judgment *ex delicto* as well as by a judgment *ex contractu*, and makes the one as well as the other a provable "debt." There is nothing in the language or in the context which suggests its limitation to judgments founded on debts or warrants the reading in of such a limitation.

This conclusion is confirmed by a consideration of other provisions of the Act. By § 17, as originally enacted, it was provided that: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another."[2] This express exception of certain judgments for torts from the "provable debts" released by a discharge, plainly indicates that Congress understood that under § 63a judgments for torts were "provable debts", and is strongly persuasive as a construction of that section.

Furthermore, if a judgment for tort is not a provable claim in bankruptcy under § 63a, it could not, under § 1, (11), be considered in determining whether one against whom an involuntary petition has been filed, is insolvent within the meaning of § 1, (15), providing that

[2] By the amendments of 1903 and 1917 the word "judgments" in clause 2 was changed to "liabilities", and other changes were made which are not here material. 32 Stat. 797, c. 487, § 5; 39 Stat. 999, c. 153.

"a person shall be deemed insolvent . . . whenever the aggregate of his property . . . shall not . . . be sufficient in amount to pay his debts." The result of this would be that a person having property in excess of his other debts could not be adjudged an involuntary bankrupt under § 3b of the Act, although owing judgments for tort exceeding the amount of his property. Clearly Congress did not intend so anomalous a result.

The trustee contends, however, that despite the broad language of § 63a(1), the decision in *Wetmore* v. *Markoe*, 196 U. S. 68, necessarily leads to the conclusion that only judgments founded in debt are provable claims. It was there held that under § 17 of the Act the arrears of alimony previously awarded to the wife of the bankrupt for the support of herself and their minor children under a final decree of absolute divorce was not a provable debt which was released by the bankrupt's discharge. The ground of the decision was that the court could look into the proceedings to determine the nature of the liability which had been reduced to judgment; that a decree awarding alimony was not in any just sense a debt which had been put into the form of a judgment, but rather the legal means of enforcing the obligation of the husband to support his wife and children which was imposed upon him by the policy of the law; and that it could not be presumed, in the absence of a direct enactment, that Congress intended that the Bankruptcy Act should be made an instrument by which the wife and children should be deprived of the support which it was the purpose of the law to enforce. It is clear that this decision rested on the peculiar and exceptional nature of a decree for alimony. There was no suggestion in the opinion that an ordinary claim *ex delicto* that had been previously reduced to judgment was not a provable debt; and we think that its reasoning neither leads to nor warrants such a conclusion.

Nor is there anything to support this conclusion in *Schall* v. *Camors*, 251 U. S. 239, which dealt solely with unliquidated claims arising in tort, not previously reduced to judgment, and held merely that such unliquidated claims, not being included in the enumeration of provable debts under § 63a, could not be liquidated and proven under the provisions of § 63b.

The decrees of the District Court and of the Circuit Court of Appeal are reversed, and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

Reversed and remanded.